BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In the Matter of	)	
8YY Access Charge Reform	)	WC Docket No. 18-156
	)	

USTELECOM—THE BROADBAND ASSOCIATION PETITION FOR RECONSIDERATION

I. Introduction

Pursuant to Section 1.429 of the Federal Communications Commission's rules,[1] USTelecom—The Broadband Association[2] (USTelecom) respectfully petitions the Commission to reconsider limited aspects of its 8YY Access Charge Reform Order (Order).[3] Specifically, USTelecom asks the Commission to reconsider the portion of the Order related to a revenue recovery mechanism for price cap carriers. While USTelecom supports much of the analysis and conclusions of the Order as a whole, there are factual and policy defects in the section related to price cap revenue recovery that create untenable revenue recovery shortfalls for price cap carriers.

First, the Order directs price cap carriers to look to the existing rules to address any revenue shortfalls, but the Order's rationale in denying a recover mechanism is inconsistent with the Commission's expectations when it first implemented the existing intercarrier compensation rules. Second, the Order relies on outdated Commission decisions in an era where price cap

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[1] 47 C.F.R. § 1.429.

[2] USTelecom is the premier trade association representing service providers and suppliers for the communications industry. USTelecom members provide a full array of services, including broadband, voice, data, and video over wireline and wireless networks. Its diverse membership ranges from international publicly traded corporations to local and regional companies and cooperatives, serving consumers and businesses in every corner of the country.

[3] *8YY Access Charge Reform*, WC Docket No. 18-156, Report and Order, 35 FCC Rcd. 11594 (2020). The Federal Register published the Order on November 27, 2020. 85 FR 75894.

carriers had over 90 percent of the voice market, not five percent. Finally, and perhaps most importantly from a public policy perspective, the Order fails to acknowledge the Commission's own data indicating that the average rate in a competitive *urban* area is nearly $34, when citing concerns that permitting a modest increase of one dollar that could see bills reach $31 would make the service unaffordable. The Commission should rectify these flaws by granting this Petition and instituting USTelecom's proposed recovery mechanism or, at a minimum, the proposal put forth by Frontier Communications and Windstream Communications.

II. THE COMMISSION'S REVENUE RECOVERY ANALYSIS DOES NOT CONSIDER RELEVANT FACTS ABOUT THE RULES AND MARKET FOR VOICE SERVICES, ALL OF WHICH USTELECOM AND ITS MEMBERS RAISED IN THE RECORD

A. Background

The Commission's 8YY Access Charge Reform Order successfully addressed complicated intercarrier compensation reforms that had been percolating for years. The system had led to inefficiencies, as well as waste, fraud, and abuse, which were ultimately borne by the consumer. In many respects, the Order substantially advanced the public interest.

Yet intercarrier compensation plays an important role in supporting legacy networks as an implicit support mechanism. Accordingly, the Commission's long-standing policy, which the Order acknowledges, has been to allow carriers to recover implicit subsidies lost as a result of intercarrier compensation reform via explicit cost recovery from its customers.[4] While the Commission's decisions do not guarantee revenue neutrality – and neither USTelecom nor its

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[4] *Id.* at para. 4 n.3 *quoting* the Commission's landmark 2011 decision on intercarrier compensation reform ("Under bill-and-keep arrangements, a carrier generally looks to its end-users—which are the entities and individuals making the choice to subscribe to that network—rather than looking to other carriers and their customers to pay for the costs of its network.") *Connect America Fund et al*., WC Docket No. 10-90 et al., Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 17904, para. 737 (2011) (*USF/ICC Transformation Order*), pets. for review denied sub nom. In re FCC 11- 161, 753 F.3d 1015 (10th Cir. 2014) (In re FCC 11-161).)

members expect such neutrality – the Commission has acknowledged that origination and termination of calls does impose costs, and that some revenues previously collected from other carriers will need to be collected from elsewhere.[5] This shift from implicit to explicit recovery has frequently been termed "bill and keep" because a carrier is supposed to recover the costs of its network operations from its own end users, rather than relying on payments from other users of the network.[6] Axiomatic to "bill and keep," of course, is the carrier's ability to "bill" its own customers—otherwise there is nothing to "keep," only revenue losses from the regulatory decision to remove the implicit subsidy.

Without the ability to recover costs associated with originating 8YY traffic revenue from their own customers, some carriers face important revenue shortfalls with no recourse. This is particularly the case where price cap carriers have reached the Commission-specified maximum voice service rate of $30[7] or have no "headroom" remaining in the eligible recovery formula to adjust their rates.[8] In those cases, absent a new recovery mechanism, carriers are left without any means of recovering their origination costs.

USTelecom and its members repeatedly flagged the importance of revenue recovery for the Commission as it considered the best means of implementing 8YY access charge reform.[9]

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[5] *See id.*

[6] *Id.*

[7] *See* 47 C.F.R. § 51.915(b)(12) (defining the "Residential Rate Ceiling" at $30 per month).

[8] *See* Letter from Thomas Whitehead, VP Federal Government Affairs, Windstream, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 18-156 (filed Dec. 17, 2018) (Describing a joint Frontier-Windstream meeting by saying, "If the Commission nonetheless decides to move forward with 8YY reform towards a "bill-and-keep" arrangement, Frontier would need to actually be able to bill for the changes, requiring the Commission to adjust the access recovery charge cap, the $30 residential rate ceiling, and the subscriber line charge to allow for recovery of lost access charge revenues.").

[9] *See* Letter from Mike Saperstein, USTelecom, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 18-156, 7-9 (filed Feb. 25, 2020) ("USTelecom Consensus 8YY Proposal"); Letter from Mike Saperstein, USTelecom, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 18-156, 2 (filed May 11, 2020); Letter from Russell P. Hanser,

USTelecom and others presented multiple proposals for revenue recovery, ranging from amendments to the rules governing rate ceilings to allow for modest rate increases (one proposal called for a total monthly increase of $0.30 over two years[10] while another called for a total monthly increase of $1.00 over two years[11]) to modifications to the price cap formula. Either of these remedies would have provided price cap providers with the flexibility necessary to recover the important revenue that they will forgo as a result of the Order. The Commission erred when it chose not to implement any of the proposed recovery mechanisms.

B. The Commission Should Reconsider its Assessment of the Existing Eligible Recovery Formula as a Sufficient Recovery Mechanism

The Order held that new revenue recovery mechanisms are not necessary to offset implicit 8YY access charge subsidy reductions because "our existing revenue recovery mechanisms are sufficient to facilitate incumbent local exchange carriers' reasonable recovery needs."[12] As applied to price cap carriers, this finding is an error that the Commission must reconsider. Price cap carriers incur costs for the origination of traffic, costs that price cap carriers previously recovered via access charges. However, those access charges have now been eliminated. Because the existing rules simply do not permit the type of recovery the Commission anticipates, a mechanism that permits *no* new recovery by definition cannot be "sufficient."

Counsel to Frontier Communications, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 18-156, 7-9 (filed Aug. 5, 2020).

[10] Letter from Russell P. Hanser, Counsel to Frontier Communications, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 18-156, 7-9 (filed Aug. 24, 2020) (Frontier/Windstream Proposal).

[11] USTelecom Consensus 8YY Proposal at 7-9.

[12] Order at para. 85.

The Order directs price cap carriers to "look to the existing rules to determine how to adjust to the changes"[13] it makes, specifically suggesting that, "consistent with our move to bill-and-keep, price cap carriers may increase their Subscriber Line Charges (SLC) or their Access Recovery Charges (ARC), *to the extent they are otherwise able to do so*."[14] Further, the Commission denies Frontier Communications' request for a recovery mechanism, stating that "[a]t the very least, it appears that Frontier's estimates fail to account for opportunities it currently has to offset 8YY revenue reductions such as any remaining room under existing Access Recovery Charge or Subscriber Line Charge caps and intrastate pricing flexibility in the states it serves."[15] To this end, the Order notes that both Frontier and Consolidated Communications have rates below their caps and therefore additional opportunities to recover revenues lost as a result of 8YY reform.[16]

The Order's rationale is flawed. As an initial matter, the vast majority of price cap LECs do not have "remaining room" under the existing ARC and SLC recovery mechanisms, and may not include originating revenues in Eligible Recovery,[17] so the directive that price cap LECs "look to the existing rules" is meaningless. Furthermore, the Order's refusal to modify the recovery mechanism simply because a handful of LECs have "remaining room" is inconsistent with the Commission's expectations when it first implemented the recovery mechanism. In instituting the Access Recovery Mechanism, the Commission chose to "adopt an ARC that is

[13] *Id.* at para. 94.

[14] *Id.* at para. 94 (emphasis added).

[15] *Id.* at para. 94 n.326.

[16] *Id.* at para. 97, n.339.

[17] A price cap provider's "Eligible Recovery" is calculated using a formula from the 2011 USF/ICC Transformation Order. *USF/ICC Transformation Order* at paras. 867-890.

subject to three important [regulatory] constraints."[18] In addition, carriers are subject to the constraint of the market. As the Commission also noted, "[i]mportantly, carriers are also *not* required to charge the ARC."[19] Indeed, the Commission *expected* carriers not to charge the entire ARC, finding that they "may be unable to charge ARCs in whole or in part based on competitive constraints or other considerations, or choose not to."[20] Thus, even if the Commission were correct that some price cap carriers could, in some places, adjust some prices, that would be no justification to deny recovery.

The Order abruptly reverses course from this long-held historical understanding, and punishes companies that did not fully raise rates to the maximum levels—if they had raised them then, according to the Commission, they would have had a better argument for more flexibility. But those companies' decision to price below the maximum shows only that there are competitive constraints on price cap LECs' ability to obtain recovery, not that price cap LECs should be denied the *opportunity* for recovery.

C. The Commission's Recently-Released Urban Rate Survey and Market Conditions Contradict the Order's Analysis and Conclusions

The Commission also erred when it refused to consider revenue recovery mechanisms on the basis of maintaining service affordability. The Order states that, "[i]n regulating end-user charges, the Commission has always had to account for important consumer interests, including 'ensuring that all consumers have affordable access to telecommunications services.' To ensure that increases in end-user charges do 'not impact the affordability of rates' the Commission has routinely capped such increases . . . Because we are concerned about affordability, we reject

[18] *Id.* at para. 908.

[19] *Id.*

[20] *Id.* at para. 908, n. 1781.

those proposals and the USTelecom proposal to increase the Residential Rate Ceiling by $1.00 a month to $31.00 per month."[21] Similarly, the Order rejects a proposal to increase the Subscriber Line Charge by $0.15/year for two years.[22] The Commission's dismissal based upon affordability concerns did not consider the fact that its own data, released shortly after the Commission voted to approve the 8YY Order, shows that its $30 rate cap on price cap pricing is substantially *below* the average rate for both urban and rural voice services.

The Commission annually conducts a survey of fixed voice services for the purposes of determining reasonable comparability benchmarks for Eligible Telecommunications Carriers (ETCs) that receive universal service support. Based on the survey, the Commission calculates an average urban rate, and then calculates two standard deviations from that rate in order to determine the maximum rates ETCs can charge for provisioning service in rural areas. On November 30, 2020, just over a month after the Open Meeting at which the Commission approved the Order, the Wireline Competition Bureau and Office of Economics and Analytics released a Public Notice reporting the results of the 2021 Urban Rate Survey.[23] The Public Notice reported that "[b]ased on the survey results, the 2021 urban average monthly [voice] rate is $33.73. Therefore, the reasonable comparability benchmark for voice services, two standard deviations above the urban average, is $54.75. Under the Commission's rules, each ETC, including competitive ETCs providing fixed voice services, must certify . . . that the pricing of its basic residential voice services is no more than $54.75."[24] In other words, the Wireline

[21] Order at para. 99.

[22] Frontier/Windstream Proposal at 4.

[23] *Wireline Competition Bureau and Office of Economics and Analytics Announce Results of 2021 Urban Rate Survey for Fixed Voice and Broadband Services, Posting of Survey Data and Explanatory Notes, and Required Minimum Usage Allowance for Eligible Telecommunications Carriers*, Public Notice, DA 20-1409 (OEA, WCB Nov. 30, 2020).

[24] *Id.* at 1 (citations omitted).

Competition Bureau and Office of Economics and Analytics found that in urban areas, the average price of voice service was nearly $34 and that, accordingly, ETCs are permitted to charge up to about $55 for voice services in rural parts of the country—the very same areas where price cap ILECs have long served.

The Commission should reconsider its Order based upon the new facts presented in its Urban Rate Survey. USTelecom had previously flagged the Urban Rate Survey and its findings that voice rates are consistently higher than the $30 rate,[25] which the Commission dismissed as "unrelated to the outcome of this proceeding and do not alleviate . . . concerns about protecting consumers from unnecessary rate hikes."[26] In light of the most recent Urban Rate Survey data and the Order's reliance on "affordability" as a factor in denying a recovery mechanism, these factors are very much related and a cursory footnote does reasonably explain otherwise. It is inexplicable why the modest proposals in the record, allowing ILECs to price their service at $31 or $30.30, would render voice service "unaffordable" when (1) the Urban Rate Survey acknowledges that the average rate for voice service in the most economic areas to serve is $2.73-$3.43 *more* than the rejected proposals for revenue recovery; and (2) ETCs with unregulated voice services are permitted to charge between $23.75 to 24.45 *more per month*, ($285-$293.40/year), under the theory that those rates are "reasonably comparable," while the Order rejects revenue recovery proposals of a much more modest scale.

The Order also seems to be stuck in a regulatory time warp that ignores market conditions. The Order cites a 2000 Commission decision "declining to raise the Subscriber Line

[25] Letter from Mike Saperstein, USTelecom, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 18-156 (filed Sept. 15, 2020).

[26] Order at para. 98 n.348.

Charge ceiling for primary residential and single-line business lines 'because a higher SLC could make telecommunications service unaffordable for some consumers.'"[27] Regulation of ILEC switched access rates may have been necessary 20 years ago, when there were approximately 120 million ILEC switched access voice customers. Today, however, that figure has been reduced by 90 percent, and this subset of customers are projected to make up only 5 percent of the total voice service market by the end of 2020. Against this backdrop of line-count reductions, it is particularly vexing that the Order would cite a 2001 decision for the proposition that price cap carriers can offset the loss of 8YY access revenues by relying on "various economies of scale to generate cost-saving efficiencies, thereby reducing the relative impact of any revenue reductions."[28] Whatever economies of scale might have existed for price cap ILECs in 2001 are long gone. Today the struggle is to amortize costs over a much smaller and shrinking customer base. The Commission must also explain how its citation to the 2011 decision setting Access Recovery Charge maximums[29] comports with the 2020 findings, released only a month later, that the average urban rates have advanced substantially beyond (and in fact now are almost double) the $30 cap set for ILEC switched access lines nine years ago. Under any of the proposed recovery mechanisms, price cap ILEC voice service rates would remain below the Commission's most recent data on affordability.

D. Providing a Revenue Recovery Mechanism is the Appropriate Remedy

Pursuant to the Commission's rules, a petition for reconsideration will be granted where "the facts or arguments relied on relate to events which have occurred or circumstances which

[27] *Id.* at para. 98 n.342.

[28] *Id.* at para. 94.

[29] *Id.* at para. 98 n. 342.

have changed since the last opportunity to present such matters to the Commission"[30] and also where "the Commission determines that consideration of the facts or arguments relied on is required in the public interest."[31] Both situations are present here. The Commission had the data necessary to determine the results of the 2021 Urban Rate Survey as of August 28, 2020, but did not publish the results until November 30, 2020. The release of the data is an intervening event occurring after USTelecom's last opportunity to present argument to the Commission. With respect to public interest, the Commission did not consider its own precedent in reviewing the eligible recovery formula. Further, the Order's reliance on judgments about ILEC switched access market conditions from 2000-2001 are entirely unwarranted, because the marketplace of 20 years ago bears no resemblance to the facts on the ground today. Accordingly, it is in the public interest for the Commission to reconsider its decision and grant price cap carriers a recovery mechanism to offset the losses of implicit subsidies caused by the actions the Order implements.

III. CONCLUSION

For the foregoing reasons, USTelecom respectfully requests the Commission to reconsider its 8YY Access Charge Reform Order and provide the requested recovery mechanism for price cap carriers.

Respectfully submitted,

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[30] 47 C.F.R. § 1.429(b)(1).

[31] *Id.* at § 1.429(b)(3).